Chow Jieen (a child suing through her father and litigation representative, Chow Chee Kong) & Ors v Kerajaan Malaysia (Kementerian Pendidikan Malaysia) & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-1702–10 OF 2016
NANTHA BALAN J
6 APRIL 2018

Education — Assessment and examination — Prohibition on the conduct of examinations — Third defendant, a Chinese secondary school not part of 60 Chinese Private Secondary Schools ('CPSS') — Second defendant conducted Unified Examination Certificate examination — Whether students of third defendant could lawfully sit for examination — Whether approval of Director of the Examination Board under s 69(1) of the Education Act 1996 necessary — Whether status quo of CPSS ought to be maintained — Education Act 1996 s 69(1)

The present originating summons was brought by the plaintiff for the court to determine the issue of whether the students of a Chinese secondary school, namely, Sekolah Menengah Chong Hwa, Kuantan ('the school') may lawfully sit for an examination known as the Unified Examination Certificate ('UEC examination') which was conducted by the United Chinese School Committees' Association of Malaysia ('the second defendant'). The plaintiffs contended that, the students of the school were not entitled to sit for the UEC examination because the school was not part of the 60 Chinese Private Secondary Schools ('CPSS') and there was no approval by the Director of the Examination Board under s 69(1) of the Education Act 1996 ('the Act'). The plaintiff further argued that based on s 151 of the Act, the status quo of the CPSS ought to remain and it could not be administratively extended by reference to letters from the Ministry of Education or any of its departments. The second defendant took the position that the students of the school were entitled to sit for the UEC examination. It was argued that in light of the curriculum that was approved by the Ministry of Education when the school was set up in 2012 and its registration in 2014 and all the correspondence subsequent thereto, the students of the school could lawfully sit for the UEC examination and that the approval of the Director of the Examination Board was not required.

Held:

(1) There was nothing in s 69(1) of the Act which circumscribed the power of the Ministry of Education (via the Director of Examination Board) to

approve the students of a non-CPSS to take the UEC examination. Therefore, the argument by the first and fourth plaintiffs that the 'status quo' of CPSS ought to be maintained as a matter of law, was plainly untenable as there was clearly statutory power under s 69(1) of the Act for the Director of Examination Board to grant approval for the UEC examination to be conducted at a non-CPSS school, such as the school (see para 45).

(2) The approval under s 69(1) of the Act was not necessary because such approval was already subsumed in the approval which was given in 2012 for the setting up of the school and when the Certificate of Registration was issued on 21 April 2014. As such, the conduct of the UEC examination by the second defendant and the taking of the UEC examination by students of the school in October 2016 and October 2017 was lawful and was completely in compliance with the terms/conditions of the approval that was given by the Ministry of Education in 2012 and when the school was registered in 2014 (see para 50).

[Bahasa Malaysia summary

Saman pemula ini telah dimulakan oleh plaintif untuk mahkamah menentukan isu sama ada pelajar-pelajar sekolah menengah Cina, iaitu, Sekolah Menengah Chong Hwa, Kuantan ('sekolah tersebut') boleh dengan sah menduduki peperiksaan yang dikenali sebagai Sijil Peperiksaan Bersepadu ('peperiksaan SPB') yang telah dijalankan oleh Persatuan Jawatankuasa Sekolah Cina Bersatu Malaysia. Plaintif-plaintif menegaskan bahawa, pelajar-pelajar sekolah tersebut tidak layak menduduki peperiksaan SPB itu kerana sekolah tersebut bukan sebahagian daripada 60 Sekolah-Sekolah Menengah Swasta Cina ('SSMSC') dan tiada kelulusan oleh Pengarah Lembaga Peperiksaan di bawah s 69(1) Akta Pelajaran 1996 ('Akta tersebut'). Plaintif selanjutnya berhujah bahawa berdasarkan s 151 Akta tersebut, status quo SSMSC patut kekal dan ia tidak boleh secara pentadbiran dilanjutkan melalui rujukan kepada surat-surat daripada Kementarian Pendidikan atau mana-mana jabatannya. Defendan kedua mengambil kedudukan bahawa pelajar-pelajar sekolah tersebut layak menduduki untuk peperiksaan SPB itu. Ia dihujahkan bahawa berdasarkan kurikulum yang diluluskan oleh Kementerian Pendidikan apabila sekolah tersebut ditubuhkan pada 2012 dan pendaftarannya pada 2014 dan semua surat-menyurat selepas itu, pelajar-pelajar sekolah tersebut boleh dengan sah menduduki peperiksaan SPB dan bahawa kelulusan Pengarah Lembaga Peperiksaan tidak diperlukan.

Diputuskan:

(1) Tiada apa-apa dalam s 69(1) Akta tersebut yang membatasi kuasa Kementerian Pendidikan (melalui Pengarah Lembaga Peperiksaan) untuk meluluskan pelajar-pelajar yang bukan SSMSC daripada

A mengambil peperiksaan SPB. Oleh itu, hujah oleh plaintif-plaintif pertama dan keempat bahawa 'status quo' SSMSC patut dikekalkan sebagai suatu perkara undang-undang, adalah jelas tidak dapat dipertahankan kerana jelas terdapat kuasa statutori di bawah s 69(1) Akta tersebut untuk Pengarah Lembaga Peperiksaan memberikan kelulusan
B untuk peperiksaan SPB itu dijalankan di sekolah bukan SSMSC, sepertimana sekolah tersebut (lihat perenggan 45).

(2) Kelulusan di bawah s 69(1) Akta tersebut adalah tidak perlu kerana kelulusan sedemikian telahpun termasuk dalam kelulusan yang
C diberikan pada 2012 untuk menubuhkan sekolah tersebut dan apabila Perakuan Pendaftaran dikeluarkan pada 1 April 2014. Oleh itu, Pengendalian peperiksaan SPB oleh defendan kedua dan pengambilan peperiksaan SPB oleh pelajar-pelajar sekolah tersebut pada Oktober 2016 dan Oktober 217 adalah sah dan telah mematuhi sepenuhnya
D terma/syarat kelulusan yang telah diberikan oleh Kementerian Pendidikan pada 2012 dan apabila sekolah tersebut didaftarkan pada 2014 (lihat perenggan 50).]

Cases referred to

E *Ting Chuen Peng (suing as representative of State Member for the State of Negeri Sembilan of the United Chinese School Committes' Association of Malaysia (Dong Zong)) & Ors v Yap Kian @ Yap Sin Tian (sued in his personal capacity and as Chairman of United Chinese School Committees' Association of Malaysia (Dong Zong) & Anor* [2016] 7 MLJ 445; [2016] 10 CLJ 688, HC (refd)
F

Legislation referred to

Education Act 1996 ss 17, 18, 19, 69, 69(1), 151
Education Ordinance 1957
Societies Act 1966
G

Douglas Yee (Lim Pit Feng with him) (Douglas Yee) for the first, second and third plaintiffs.
Cheang Lek Choy (Lek Choy & Co) for the fourth plaintiff.
KF Wong (HS Lim with him) (KF Wong & Lee) for the second defendant.
H *Ong Siew Wan (Toh Seng Soon with him) (Andrew, David Wong & Ong) for the third defendant.*

Nantha Balan J:

I INTRODUCTION

[1] These are my grounds of judgment in respect of an originating summons dated 14 October 2016 ('the OS') . The issue here is whether the students of a Chinese secondary school, namely, Sekolah Menengah Chong Hwa, Kuantan

('the school') may lawfully sit for an examination known as the United Examination Certificate or 'UEC examination' which is conducted by the United Chinese School Committees' Association of Malaysia. The United Chinese School Committees' Association of Malaysia is a society registered under the Societies Act 1966 and they are known within the Chinese community of Malaysia as 'Dong Zong'. Dong Zong is the second defendant in the OS. In this judgment, they shall be referred to as Dong Zong.

[2] The first plaintiff ('P1') is a student of Sekolah Menengah Cina Batu Pahat, Johor. The second plaintiff ('P2') is a student of Sekolah Menengah Yong Peng, Johor. The third plaintiff ('P3') is a student of Sekolah Menengah Kuen Cheng, Kuala Lumpur. The fourth plaintiff ('P4') is a student of Sekolah Menengah Chong Hwa Kluang, Johor. The first defendant ('D1') is the Ministry of Education/Government of Malaysia. D1 applied to strike themselves out as a party. The application was dismissed by this court. They appealed and the Court of Appeal allowed their appeal and they were accordingly struck out as a party.

[3] The school is the third defendant. They are a Chinese secondary school, incorporated and registered in 2012 by the Ministry of Education pursuant to the National Education Policy (Dasar Pendidikan Kebangsaan) and ss 17, 18 and 19 of the Education Act 1996.

BASIC ISSUE

[4] The basic issue arising under the OS is whether the students of the school, are legally entitled to sit for the UEC examination which is conducted by Dong Zong. In this regard, the parties here have taken diverse positions on the issue of whether Dong Zong can conduct the UEC examination at the school and whether the students of the school can lawfully sit for the UEC examination. But before I allude to the positions taken by the parties, it would be helpful to set out the historical narrative of Dong Zong, the UEC examination and of Chinese education in Malaysia.

DONG ZONG

[5] In so far as the history of Dong Zong is concerned, I need only refer to the case of *Ting Chuen Peng (suing as representative of State Member for the State of Negeri Sembilan of the United Chinese School Committes' Association of Malaysia (Dong Zong)) & Ors v Yap Kian @ Yap Sin Tian (sued in his personal capacity and as Chairman of United Chinese School Committees' Association of Malaysia (Dong Zong) & Anor* [2016] 7 MLJ 445; [2016] 10 CLJ 688. In that case, I had occasion to refer to the history of Dong Zong. I will therefore reproduce the relevant paragraphs from that judgment in so far as it touches on

A the history of Dong Zong:

History of Dong Zong

[10] At the outset, it is I think, important to have an understanding of the history and the origins of the Dong Zong and the resultant contributions that it has made to the Chinese community in Malaysia principally in terms of the promotion and development of Chinese education. The history of the Dong Zong has been set out in the affidavits filed by the pmiies and is not a matter of dispute.

[11] The appropriate starting point is the objects of the Dong Zong which are as stated in r 4 of Dong Zong's Constitution (hereinafter referred to as 'the Constitution'). It reads as follows:

RULE 4 — OBJECTS

The objects of the Association shall be:

4.1 To unite the members and to promote and develop the cause of Chinese education in Malaysia;

4.2 To discuss, promote and manage jointly the affairs pertaining to the development and amelioration of the Chinese Schools in Malaysia/State, including the curricula, examinations, teacher training, education funds and other related matters;

4.3 To strengthen and consolidate the relationship among the Chinese School Committees in Malaysia;

4.4 To unite and consolidate the strength of the Chinese Community in Malaysia in seeking to improve Chinese schools and promote the cause of Chinese education;

4.5 To represent the Chinese School Committee Associations in Malaysia in negotiating with Government on all matters in respect of the Chinese schools;

4.6 To seek the co-operation between the school committee members and the teachers in Malaysia;

4.7 To foster harmony and unity among different ethnic groups;

4.8 To purchase, take on lease or tenancy or in exchange, hire or otherwise acquire any movable or immovable property, which may be deemed necessary, convenient for any of the purpose by the Association; and

4.9 To sell, manage, lease, charge, dispose of, or otherwise deal with all or any part of the property of The Association.

[12] Thus, it can be seen quite clearly that the 'raison d'etre' of the Dong Zong is the promotion and development of Chinese education in Malaysia. It would therefore be fair to say that the Dong Zong is synonymous with Chinese education in Malaysia. Hence, for historical and societal reasons the Dong Zong are (or at least they should be regarded as) the main voice of the Chinese community in terms of

discussions or negotiations with the Government of Malaysia in respect of all matters/issues relating to Chinese schools and Chinese education in Malaysia.

[13] In this regard, according to the plaintiffs, the Dong Zong has over the years, worked with and co-operated with 'United Chinese School Teachers' Associations of Malaysia' (hereinafter referred to as 'Jiao Zong') and other organisations and associations to protect, promote and develop Chinese education in Malaysia. According to the evidence, as a result of the past close relationship and cooperation between Dong Zong and Jiao Zong, the Chinese community tend to refer to both organisations collectively as 'Dong Jiao Zong'. Many within the Chinese community regard them as being one organisation. The manifestation of the close cooperation between Dong Zong and Jiao Zong is evidenced by the following events:

(a) In the 1970s, Dong Zong and Jiao Zong jointly established the 'Malaysian Independent Chinese Secondary Schools Working Committee' (hereinafter referred to as 'MICSSWC') to protect, promote and develop Chinese independent secondary schools in Malaysia including, among others, conducting annual examinations 'United Independent Chinese Secondary School examination' or 'United Chinese Independent Secondary School Examination' ('the UEC Examination') and issuing certificates for the UEC Examination.

(b) According to the plaintiffs the UEC examination is recognised by more than 800 universities and higher education institutions worldwide.

(c) In 1969, the leading Chinese education activists in Dong Zong, Jiao Zong and other organisations have promoted and incorporated, a non-profit company, named Merdeka University Bhd ('MU Bhd') with the objectives, inter alia, to protect and develop Chinese higher education and to establish and operate a Chinese University. However, MU Berhad was unable to realise its objective of establishing such a university.

(d) In 1994, Dong Zong, Jiao Zong, MU Bhd and a few Chinese education activists had set up 'Dong Jiao Zong Higher Learning Centre Sdn Bhd' with its objectives, among others, to set up, run and develop the Chinese Higher Education. At present, the Dong Jiao Zong Higher Learning Centre Sdn Bhd operates and manages a college, ie, the 'New Era College' which is duly registered under the Ministry of Education of Malaysia ('New Era College').

(e) In 1994, Dong Zong and Jiao Zong had established 'Dong Jiao Zong Chinese Primary School Working Committee' to unite them to further protect, promote and develop Chinese primary schools in Malaysia.

(f) Dong Zong, Jiao Zong, Kuala Lumpur and Selangor Chinese Assembly Hall and 11 more jointly drafted and presented a memorandum of appeal of the Chinese society in 1999.

(g) In the subsequent years, Dong Zong and Jiao Zong continued to work together and cooperate with each other.

[14] Continuing with the history of the Dong Zong, the plaintiffs maintain that

since its incorporation, Dong Zong has been working closely and in cooperation with not only Jiao Zong but also alumni associations, parents-teachers associations, educational and cultural organisations, communities and associations and other fellowship organisations to protect, promote and develop primary, secondary and higher education in Malaysia. Besides Jiao Zong, the other fellowship organisations of Dong Zong are:

(a) Gabungan Pertubuhan Cina Malaysia;

(b) Dewan Perhimpunan China Kuala Lumpur & Selangor;

(c) Persekutuan Persatuan-Persatuan Alumni Sekolah Cina Malaysia;

(d) Gabungan Persatuan Alumni Universiti Taiwan Malaysia;

(e) Nanyang University Alumni Association of Malaysia;

(f) LLG Cultural Development Centre Bhd;

(g) The Association of Graduates From Universities & Colleges of China, Malaysia;

(h) MU Bhd;

(i) Kesatuan Kebangsaan Guru-Guru Besar Malaysia;

(j) Malaysia Seven Major Clans Association; and

(k) Centre for Malaysia Chinese Studies.

[15] Hence, it is an incontrovertible fact that since the time of its establishment, Dong Zong together with Jiao Zong have been at the forefront in terms of protecting and promoting Chinese education in Malaysia and they are respected, reputable and leading organisations in the Chinese community in Malaysia.

HISTORY OF CHINESE PRIVATE SECONDARY SCHOOLS

[6] I turn now to the history of Chinese private secondary schools. The starting point in the historical narrative is Circular No 57 dated 6 January 1960 (which was issued by the Ministry of Education) ('the circular') — which deals with the condition for conversion of secondary schools to fully assisted schools. Pursuant to the circular, any Chinese secondary school which intends to become fully assisted by the Government of Malaysia, would have to be converted into a 'conforming school' and must comply with the Education Ordinance 1957 (see: exh DK — encl 38). Around 1962, 78 Chinese secondary schools opted to convert into conforming schools bearing the name of Sekolah Menengah Jenis Kebangsaan ('SMJK'). Thus, schools bearing the prefix SMJK are fully assisted schools which are in compliance with the Education Ordinance 1957.

[7] However, 60 Chinese secondary schools opted not to participate in the conversion exercise and did not want to comply with the Education Ordinance

1957. These schools did not want to follow the National Education Policy and the national curriculum standard. These 60 Chinese secondary schools therefore became known as the 60 Chinese Private Secondary Schools or Sekolah Menengah Persendirian Cina.

[8] I shall refer to these schools by their abbreviation — 'CPSS'. Thus, notwithstanding the Education Act 1996 and the requirement for, inter alia, compliance with a national curriculum, the status quo was maintained for the CPSS by virtue of s 151 of the Education Act 1996. This is also to be gleaned from the *Hansard of Parliamentary Debates* (Dewan Rakyat, Ninth Parliament, First Session, Third Meeting). The status of the CPSS is set out in the *Hansard* under art 151 of the Education Bill 1995 on 18 December 1995 in the Dewan Rakyat. It states that 'Fasal 151 mengekalkan status quo sekolah rendah jenis kebangsaan Cina dan Tamil. Fasal 151 juga mengekalkan status quo 60 buah sekolah menengah Cina swasta) sama seperti yang terdapat dalam Akta Pelajaran 1961' (exh DK2 encl 38). Thus, the position of the CPSS is preserved, protected and entrenched and the students of CPSS have always sat for the UEC examination which is conducted annually by Dong Zong. Hence, as the status quo was maintained, the CPPS were therefore allowed to continue using their own curriculum and for their students to sit for the UEC examination conducted by Dong Zong.

SETTING UP OF THE SCHOOL

[9] I turn now to the setting up of the school and its involvement with the UEC examination. The school is a private educational institution which was incorporated in 2012. Its establishment and registration was approved pursuant to the National Education Policy (Dasar Pendidikan Kebangsaan) and ss 17, 18 and 19 of the Education Act 1996. The Director-General of Education Malaysia approved the incorporation of the school via approval letter dated 26 July 2012 (exh T6 — encl 31). Therefore, the school falls directly under the purview of the Ministry of Education. The school complies with the national curriculum and its main medium of instruction is Bahasa Malaysia. But the school is not one of the CPSS. However, when they applied for registration, it was clearly stated in the relevant application that apart from the national curriculum as stipulated by the Ministry of Education Malaysia, the school would also be teaching the 'Kurikulum Sekolah Menengah Persendirian Cina yang ditetapkan oleh United Chinese School Committees Association of Malaysia (Dong Zong)'.

THE RELIEF SOUGHT IN THE OS

[10] The plaintiffs are seeking the following reliefs in the OS:

1. Based on the facts that Sekolah Menengah Chong Hwa Kuantan is not one of the

60 Chinese Private Secondary Schools ('CPSS') and that United Chinese School Committees' Association of Malaysia (hereinafter referred to as 'Dong Zong') did not obtain any prior written approval from the director of examination under Section 69(1) of the Education Act 1996:

(a) Whether it is legal for Dong Zong to allow the 113 students from Sekolah Menengah Chong Hwa Kuantan (or any of its students) to participate in an examination known as the Unified Examination Certificate (UEC)?

(b) Whether the 113 sudents from Sekolah Menengah Chong Hwa Kuantan (or any of its students) are entitled and legal to participate in an examination known as the Unified Examination Certificate (UEC)? ...

2. In the event that the answer and determination on the above paragraph (1)(a) and/or (1)(b) is negative, whether the results of the UEC examination for the 113 students from Sekolah Menengah Chong Hwa Kuantan (or any of its students) are null and void?

POSITIONS TAKEN BY THE PARTIES

[11] In terms of the position taken by the parties, P1 to P3 take the position that the issue of whether the students of the school are (*or are not*) lawfully entitled to sit for the UEC examination should be determined by the court via the OS.

[12] And as to whether the students of the school are (*or are not*) lawfully entitled to sit for the UEC examination, it was contended on behalf of P1 to P3 that pursuant to s 69(1) of the Education Act 1996, the written approval of the Director of Examination Board must be obtained, before the students of the school can sit for the UEC examination. It was accordingly contended that in this case, there is no written approval by the Director of Examination Board and that the school and Dong Zong must comply with s 69(1) of the Education Act 1996 in order to conduct the UEC examination for students of the school.

[13] P4 says that the students of the school are not entitled to sit for the UEC examination, because the school is not part of CPSS and there is no approval by the Director of the Examination Board under s 69(1) of the Education Act 1996.

[14] For its part, Dong Zong takes the position that the students of the school are entitled to sit for the UEC examination (see: paras 35–37 of Ting Chuen Peng's affidavit affirmed on 28 October 2016 — encl 6). It was argued for Dong Zong that in light of the curriculum that was approved by the Ministry of Education when the school was set up (2012) and its registration (2014) and all the correspondence subsequent thereto (which I shall refer to shortly), the students of the school can lawfully sit for the UEC examination and that the approval of the Director of the Examination Board is not required.

ANALYSIS AND CONCLUSION

[15] The central issue is whether the students of the school may lawfully sit for the UEC examination which is conducted annually by Dong Zong. The parties are divided as to whether the students of the school can lawfully sit for the UEC examination. Factually the students of the school have already sat for the UEC examination which was conducted by Dong Zong since October 2016.

[16] The question that arises under the OS is whether it is legal for the students of the school to sit for the UEC examination. The plaintiffs are all students in private Chinese schools which are part of the CPSS and are therefore exempted from the national curriculum and do not adhere to the National Education Policy. In this regard, there is no dispute that the school is not part of the CPSS. But the question is whether students of the school are not eligible to sit for the UEC examination solely because it is not part of the CPSS.

[17] In this regard, one of the points that was made by the plaintiffs is that pursuant to s 151 of the Education Act 1996, the status quo of CPSS is to be maintained and may not be altered. Section 151 of the Education Act 1996 reads as:

> 151 Saving in respect of registered educational institution, governor, manager or employee
>
> Any educational institution, governor, manager or employee registered or deemed to be registered under the provisions of the Education Act 1961 shall, on the appointed date, be deemed to have been registered under this Act and —
>
> (a) subject to (b), the provisions of this Act shall apply to the educational institution, governor, manager or employee as if the educational institution, governor, manager or employee was registered under this Act; and
>
> (b) the conditions imposed on the educational institution, governor, manager or employee prior to the corning into force of this Act shall continue to remain in force as if the conditions were imposed under this Act.

[18] The next point that was articulated for the plaintiffs was that approval of the Director of Examination Board is necessary and that here there is no written approval permitting the school and Dong Zong for the UEC examination to be conducted in the school. As such, it was argued that the school and Dong Zong are acting in breach of s 69(1) of the Education Act 1996. Section 69 of the Education Act 1996 reads as:

> 69 Prohibitions on the conduct of examinations

A (1) Subject to subsection (4), no person or educational institution shall conduct, permit or cause to be held or conducted, or be in any manner concerned in the holding or conducting of, any examination for any pupil of an educational institution or for any private candidate without the prior written approval of the Director of Examinations.

B (2) In granting approval under subsection (1), the Director of Examinations may impose such restrictions, terms and conditions as he deems fit.

(3) A reference in this section to the holding or conducting of an examination shall be deemed to include the act of —

C (a) inviting candidates for an examination;

(b) collecting or receiving any fee or payment or any donation or gift in respect of an examination;

(c) preparing any syllabus, course or scheme of study in respect of an D examination;

(d) marking or grading of answers or responses to questions or tests in an examination;

(e) issuing or granting any diploma or other document or form of recognition in respect of an examination, and any other act related E to the holding or conducting of an examination, regardless whether the act is done before or after the examination.

(4) Subsection (1) shall not apply to —

F (a) a body or syndicate established to manage and conduct examinations under paragraph 68(e);

(b) the Malaysian Examinations Council established under the Malaysian Examinations Council Act 1980 [Act 225]; and

(c) an educational institution which conducts its own examination, test G or other forms of assessment for the purpose of assessing its own pupils.

(5) A person who contravenes subsection (1) or fails to comply with any restriction, term or condition imposed under subsection (2) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten H thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[19] As a starting point, it is important to emphasise that the school is the 'sister school' to Sekolah Menengah Persendirian Chong Hwa Kuala Lumpur. I The latter is one of the CPSS which does not follow the national curriculum. When the application was made to the Ministry of Education in 2012 for the setting up of the school, a 'Memorandum Permohonan Menubuh Cawangan Sekolah Menengah Persendirian Chong Hwa Kuala Lumpur' was submitted as part of the application. In that memorandum it was clearly stated (quite

significantly I might add) that *the school will have two streams of curriculum*, namely the national curriculum as stipulated by the Ministry of Education Malaysia and the 'Kurikulum Sekolah Menengah Persendirian Cina yang ditetapkan oleh United Chinese School Committees Association of Malaysia (Dong Zong)'. The memorandum also states:

> ... *semua pelajar diwajib mengambil Peperiksaan UEC iaitu Peperiksaan Bersama Sekolah-Sekolah Menengah Persendirian Cina yang dikelolakan oleh Dong Zong* pada Tingkatan *Junior Middle* 3 dan juga Tingkatan *Senior Middle* 3. (Emphasis added.)
>
> (see: p 88, exh T4, encl 31)

[20] In the application form dated 15 June 2012, in items 1 and 4 (p 109, exh T5, encl 31) it was clearly stated that the curriculum would be the national curriculum KBSM *and UEC*. On 26 July 2012, the Ketua Pengarah Pelajaran Malaysia issued a letter of approval for the setting up of SM Chong Hwa Kuantan (pp 122–128, exh T6, encl 31). In para 3.7 of the letter of approval, it is stated that the approved curriculum is 'Kurikulum Kebangsaan (KBSM/KSSM)' (p 125 encl 31) and in para 8 of the letter it is stated that:

> Kurikulum yang diluluskan bagi institusi ini adalah Kurikulum Kebangsaan (KBSM/KSSM). Kementerian Pelajaran Malaysia juga *mengambil maklum bahawa institusi ini akan juga melaksanakan mata pelajaran di luar Kurikulum Kebangsaan.*
>
> (see: p 128, exh T6 encl 31)

[21] What happened next is that the school wrote (*perhaps out of an abundance of caution*) to the Ministry of Education Malaysia via letter dated 14 August 2012 wherein it was pointed out that the school would be conducting the *UEC curriculum* as well as the national curriculum. Paragraph 3 of the letter dated 14 August 2012 significantly reads as follows:

> 3. Merujuk kepada perkara ke-8 dalam surat kelulusan tersebut, pihak kami ingin memaklumkan bahawa institusi yang ditubuhkan ini akan juga melaksanakan kurikulum di luar Kurikulum Kebangsaan *iaitu Kurikulum Unified Examination Certificate (UEC) dengan menggunakan bahasa Cina sebagai bahasa pengantar.* (Emphasis added.)
>
> (see: p 131, exh T7 encl 31)

[22] In a letter dated 11 December 2012, the Ministry of Education wrote to the Pengerusi Lembaga Pengelola Sekolah Menengah Persendirian Chong Hwa Kuala Lumpur and stated that:

> 2. Bahagian Pendidikan Swasta, Kementerian Pelajaran Malaysia *mengambil maklum* akan maklumat tambahan yang dikemukakan oleh YBhg Tan Sri Dato' bagi melengkapkan maklumat bagi kelulusan penubuhan Sekolah Menengah Chong Hwa Kuantan

(see: p 135 exh T8, encl 31)

[23] In this regard, it is important to emphasize that the Certificate of Registration dated 21 April 2014 issued by the Jabatan Pendidikan Pahang for the establishment of the school states pertinently in para (iv) that the school will implement the national curriculum as *well as subjects outside the national curriculum.* It reads as:

> KURIKULUM KEBANGSAAN (KBSM/KSSM)
>
> (Kurikulum yang diluluskan bagi institusi ini adalah Kurikulum Kebangsaan (KBSM/KSSM). Kementerian Pendidikan Malaysia juga mengambil maklum bahawa institusi yang ditubuhkan ini *akan melaksanakan mata pelajaran di luar Kurikulum Kebangsaan*).
>
> KP/KPPM/BPSWASTA(23) BERTARIKH: 26 JULAI 2012
>
> (see: p 139 exh T9, encl 31)
>
> (Emphasis added.)

[24] The initial problem (which gave rise to the uncertainty) may be traced to a letter dated 1 September 2014 from Gabungan Lembaga Pengurus Sekolah Cina Pahang which reads:

> En Rosli Bin Ismail
>
> Pengarah,
>
> Jabatan Pendidikan Pahang
>
> Bandar Indera Mahkota,
>
> 25604 Kuantan,
>
> Pahang Darul Makmur.
>
> 1hb Sep 2014
>
> SEKOLAH MENENGAH CHONG HWA, KUANTAN
>
> Tuan,
>
> Merujuk kepada perkara tersebut di atas, kami ingin mendapat maklumat tentang sekolah yang tersebut di atas.
>
> 1. Adakah sekolah ini sebuah sekolah independent yang diiktiraf oleh kerajaan?
>
> 2. Bolehkah pelajar dari sekolah ini dibenarkan mengambil peperiksaan Unify (Unify Examination Chinese) yang dilaksanakan oleh Dong Jong?
>
> Diharap tuan dapat memberi penerangan dan maklumat supaya sekolah ini tidak menjadi kontroversi didalam kalangan masyarakat.

[25] In response to the letter dated 1 September 2014 from Gabungan

Pengurus Sekolah Cina Pahang, the Pengarah Pendidikan Pahang issued a letter dated 10 September 2014 stating that:

> 2.2 Pendaftaran institusi ini adalah sebagai Sekolah Menengah Swasta yang menjalankan *Kurikulum Kebangsaan (KBSM)* dan *bukan* sebagai sekolah 'Independent'.
>
> 2.3 Sekolah ini *tidak dibenarkan* mengambil peperiksaan Unify (Unify examination Chinese) yang dilaksanakan oleh Dong Jong. (Emphasis added.)
>
> (see: p 142, exh T10 encl 31)

[26] Thereafter by letter dated 18 September 2014, the Pengarah Pendidikan Pahang wrote to the Gabungan Lembaga Pengurus Sekolah Cina Pahang and 'withdrew' their earlier letter dated 10 September 2014. Interestingly in a letter dated 18 September 2014 issued by the Ketua Pengarah Pelajaran Malaysia to the Gabungan Lembaga Pengurus Sekolah Cina Pahang, it was stated that:

> 2. Sukacita dimaklumkan bahawa Kementerian Pendidikan Malaysia (KPM) telah meneliti surat tuan berhubung perkara di atas dan berdasarkan surat Kelulusan Penubuhan Institusi Pendidikan Swasta KP/KPPM/BPSWASTA (23) bertarikh 26 Julai 2012, status Sekolah Menengah Chong Hwa, Kuantan, Pahang ialah sebuah institusi pendidikan swasta dengan no. Perakuan Pendaftaran CGAE002.
>
> 3. Merujuk para 8 surat kelulusan tersebut, kurikulum yang telah dilulus untuk dilaksanakan di sekolah tersebut adalah Kurikulum Kebangsaan (KBSM/KSSM) dan mengikuti peperiksaan oleh badan pensijilan yang ditetapkan iaitu Lembaga Peperiksaan Malaysia dan Majlis Peperiksaan Malaysia seperti para 3.7.
>
> 4. Walau bagaimanapun, *Kementerian Pendidikan juga mengambil maklum bahawa institusi ini akan juga melaksanakan mata pelajaran di luar Kurikulum Kebangsaan seperti yang dinyatakan dalam para 8, surat kelulusan tersebut.*
>
> 5. Sehubungan dengan itu, sebagai sebuah institusi pendidikan swasta, sekolah ini juga tertakluk kepada syarat-syarat yang telah ditetapkan dalam surat Kelulusan Penubuhan Institusi Pendidikan Swasta KP/KPPM/BPSSWASTA (23) bertarikh 26 Julai 2012. (Emphasis added.)
>
> (see: pp 146–147, exh T11 encl 31)

[27] Then, by letter dated 13 October 2014 (p 150, exh T12, encl 31) Dong Zong wrote to Ketua Pengarah Pelajaran Malaysia and notified Ministry of Education that the students of the school would be taking the UEC examination.

[28] In a letter dated 23 October 2014, the Ketua Pengarah Pelajaran Malaysia wrote to Dong Zong stating that they had taken note ('mengambil maklum') of the contents of Dong Zong's letter (p 153, exh T13, encl 31).

[29] On 13 February 2015, SM Chong Hwa Kuantan wrote to Ketua Pengarah Pelajaran Malaysia stating that the Honourable Prime Minister had announced that the students of the school are allowed to take the UEC examination:

> 2. Sejajar dengan pengumuman YAB Perdana Menteri, Dato' Sri Najib Tun Razak pada 31 Ogos 2012 bahawa pelajar-pelajar Sekolah Menengah Chong Hwa Kuantan adalah dibenarkan untuk menduduki Peperiksaan Bersama Sekolah-Sekolah Menengah Persendirian Cina Malaysia (peperiksaan Unified Examination Certificate, UEC) maka dengan segala hormatnya dimaklumkan bahawa pelajar-pelajar sekolah ini akan mengambil peperiksaan tersebut mulai tahun 2016.
>
> (see: p 156, exh T14 encl 31)

[30] By letter dated 11 March 2015, Ketua Pengarah Pelajaran Malaysia wrote to the school stating that they took note ('mengambil maklum') of the contents of the letter (p 159 exh T15, encl 31).

[31] By letter dated 6 October 2015, the school wrote to the Ketua Pengarah Pelajaran and sought permission for their students to sit for the UEC examination in 2016. The relevant paragraphs of the said letter read as:

> Dengan hormatnya perkara di atas dirujuk. Surat Kelulusan Penubuhan Institusi Pendidikan Swasta: Sekolah Menengah Chong Hwa Kuantan, KP/KPPM/BPSWASTA (23) bertarikh 26 Julai 2012 juga dirujuk.
>
> 2. Berdasarkan Perkara 8 pada Surat Kelulusan tersebut di atas, Sekolah Menengah Chong Hwa Kuantan telah pun melaksanakan Kurikulum Kebangsaan (KBSM) dan juga mata pelajaran di luar Kurikulum Kebangsaan, iaitu, Kurikulum Unified Examination Certificate (UEC) sejak sekolah kami mula beroperasi pada Januari 2014.
>
> 3. Sehubungan itu, sukacita dimaklumkan bahawa seramai 130 orang pelajar sekolah ini akan menduduki peperiksaan PT3 dan UEC Rendah pada tahun 2016.
>
> 4. Kami berbesar hati memohon agar pihak YBhg Dato' Sri dapat membenarkan pelajar-pelajar kami menduduki peperiksaan UEC tersebut.
>
> (see: pp 168–169, exh T17 encl 31)

[32] On 22 October 2015, Ketua Pengarah Pelajaran Malaysia, Dato' Sri Dr Mohd Khair bin Mohamad Yusof issued a letter addressed to the Chairman of the Organising Board of the school stating that the Ministry of Education (within the purview and jurisdiction of D1) has 'no objection' to the students of the school sitting for the Lower UEC examination in 2016 (see: exh T17 encl 31) and stated that:

> 2. Pihak Kementerian Pendidikan Malaysia *tiada halangan dan mengambil maklum berkaitan murid-murid Sekolah Menengah Chong Hwa Kuantan menduduki*

peperiksaan UEC Rendah pada tahun 2016 (Emphasis added.)

(see: p 170 encl 31)

[33] The present problem started when an organisation known as the Persatuan Bekas Pelajar Berpendidikan Sekolah Cina Malaysia (Malaysia Chinese Educated Students Association) wrote a letter dated 2 September 2016, to the Director of Examinations Board wherein it raised concerns about the legality of the students of the school taking the UEC examination. Essentially, the association was seeking to ascertain whether the students of the school are allowed to sit for UEC examination. The relevant parts of the association's letter read as follows:

1. Kementerian Pendidikan telah mengambil maklum bahawa murid Sekolah Menengah Chong Hwa Kuantan akan menduduki peperiksaan UEC yang dikelola oleh Dong Zong.

Adakah ini bererti pihak Kementerian Pendidikan telah membenarkan Dong Zong menjalankan UEC di bawah seksyen 69 Akta Pendidikan 1996?

2. Jika tidak, adakah pengelola peperiksaan UEC Dong Zong dengan membenarkan murid Sekolah Menengah Chong Hwa Kuantan mengambil peperiksaan UEC akan menyalahi seksyen 69(1) Akta Pendidikan 1996.

Disebab pada tahun 1975 Dong Zong adalah menjalankan peperiksaan UEC untuk 60 buah sekolah persendirian masa itu berada di bawah Akta Pendidikan 1961, masa itu, Sekolah Menengah Chong Hwa Kuantan belum berada.

Jika 'Kementerian Pendidikan telah mengambil maklum bahawa murid Sekolah Menengah Chong Hwa Kuantan akan menduduki peperiksaan UEC yang dikelola oleh Dong Zong' BUKAN membenarkan Dong Zong mengambil murid Sekolah Menengah Chong Hwa Kuantan menduduki peperiksaan UEC, adalah tugas pihak Kementerian Pendidikan memberitahu Dong Zong kerana Dong Zong dan kaum Cina telah mentafsir 'mengambil maklum' ialah kebenaran di bawah Seksyen 69(1) Akta Pendidikan 1996.

(see: p 248, exh C3 encl 31)

[34] By letter dated 8 September 2016, the Director of Examinations of the Lembaga Peperiksaan wrote to the Persatuan Bekas Pelajar Berpendidikan Sekolah Cina Malaysia and took the position that *students of the school are not permitted to take the UEC examination.* The relevant paragraphs of that letter read as follows:

2. Sukacita dimaklumkan bahawa SM Chong Hwa, Kuantan telah dilulus penubuhan dan pendaftarannya sebagai sebuah institusi pendidikan swasta yang melaksanakan Dasar Pendidikan Kebangsaan seperti yang telah diperuntukkan di bawah seksyen 17, 18, dan 19 Akta Pendidikan 1996 [Akta 550] (Lampiran 1).

Lembaga Peperiksaan (LP) ingin menegaskan bahawa peperiksaan UEC hanya boleh dilaksanakan di 60 buah Sekolah Menengah Persendirian Cina (SMPC)

A sahaja selaras dengan kedudukan SMPC dan UEC sebagai status quo setelah Akta Pendidikan 1996 [Akta 550] berkuatkuasa. *Oleh itu, SM Chong Hwa, Kuantan yang tidak termasuk dalam SMPC adalah tidak tertakluk untuk melaksanakan peperiksaan UEC.* (Emphasis added.)

(see: p 250, exh C3 encl 31)

B

[35] Finally, in a letter dated 2 October 2016, the Director of Examination of Lembaga Peperiksaan wrote to Persatuan Bekas Pelajar Berpendidikan Sekolah Cina Malaysia and 'withdrew' their letter dated 8 September 2016 (see: exh A7, encl 5).

C

[36] Hence, the question is now whether in light of the above factual developments and the statutory provisions, the students of the school can lawfully sit for UEC examination.

D

[37] As mentioned earlier, as far as Dong Zong is concerned, they take the position that in light of the letter of approval for the setting up of the school and the Certificate of Registration for the school and all the correspondence alluded to above, the students of the school can lawfully sit for the UEC examination and that the approval of the Director of the Examination Board is not required. But P1 to P3 (and P4) are adamant and take the position that the CPSS is fixed and that no approval can be given to add the school to the CPSS and that the students of the school are not eligible to sit for the UEC examination which is conducted by Dong Zong.

E

F

[38] Counsel for P1 to P3 also emphasised that the school has not obtained the approval of the Director of Examination Board as per s 69(1) of the Education Act 1996 to enable the students of the school to sit for the UEC examination. Of course, on a plain reading of s 69(1) of the Education Act 1966, Dong Zong as the examining authority which conducts the UEC examination must obtain the written approval of the Director of Examination Board.

G

H

[39] But the issue is whether on the present facts vis a vis the school, Dong Zong has to comply with s 69(1) of the Education Act 1996, in order to conduct the UEC examination for students of the school. P1–P3's position is that Dong Zong must obtain such written approval and this approval has not been obtained.

I

[40] It is contended by the plaintiffs that approval is necessary because the school is not one of the CPSS which is an exception under s 151 of the Education Act 1996. It was contended for the plaintiffs that the various letters do not qualify as written approval under s 69(1) of the Education Act 1966.

[41] As a matter of fact, there is no dispute that since October 2016, the students of the school have annually been taking the UEC examination in the school. There is also no evidence that the Ministry of Education or the Department of Education or the Director of the Examination Board has issued any letter of show cause to Dong Zong or to the school with respect to the students of the school taking the UEC examination. As for the school, they contend that Dong Zong has given approval for their students to sit for UEC. Counsel for the school emphasised that the approved curriculum for the school was the National Curriculum and other curriculum. The school maintains that they wrote to Ministry of Education to inform that students will be sitting for UEC and the Ministry of Education 'took note' (p 130 encl 6). Further, Dong Zong also wrote to the Ministry of Education and informed that they will be conducting UEC examination for the students of the school and the Ministry of Education replied 'we take note' (p 133 encl 6).

[42] Clearly, to date, there is no negative or adverse response or any action by Ministry of Education or Department of Education who are all aware that the students of the school have been sitting for the UEC examination which was conducted by Dong Zong since October 2016 and in October 2017. Dong Zong takes the position that s 69(1) of the Education Act 1996 does not apply as the approval by the Ministry of Education is already subsumed in the school's application fonn and in the letter of approval by the Ministry of Education for the setting up of the school and Certificate of Registration.

[43] Having due regard to the history of the CPSS and the setting up of the school, it is clear and obvious from the correspondence referred to above, that the Ministry of Education has given its blessings or its express (or tacit) approval for students of the school to take the UEC examination. This may be gleaned from the fact that the Ministry of Education was aware that the school would be following the national curriculum and will also be conducting subjects outside the national curriculum. Indeed, the Ministry of Education seemed to have initially pendulated from one position to another. But, the ultimate position is that the Ministry of Education had clearly and unambigously indicated that it had no objections ('tiada halangan') to the students of the school taking the UEC examination.

[44] Next, it was also argued for the plaintiffs that based on s 151 of the Education Act 1996, the status quo of the CPSS must remain and it cannot be administratively extended by reference to letters from the Ministry of Education or any of its departments. Hence, the question really is, whether the Ministry of Education, who have chosen not to remain as a party in these proceedings, has the statutory power to allow students of a non CPSS school to take the UEC examination. Obviously, this would mean that the 'status quo' of the 60 CPSS would impliedly be altered upwards. In my view, the 'status quo'

issue is not a legal one. The issue may be relevant in another forum. But not in court. The court is not concerned with non-legal issues or considerations or implications. They are irrelevant.

[45] The threshold issue is whether the Ministry of Education can alter the status quo by granting approval under s 69(1) of the Education Act 1996 for students of a non-CPSS school to take the UEC examination. In this regard, I find nothing in s 69(1) of the Education Act 1996 which circumscribes the power of the Ministry of Education (via the Director of Examinations Board) to approve the students of a non-CPSS to take the UEC examination. And so, on the first point, the argument by P1 to P4 that the 'status quo' of 60 CPSS must be maintained as a matter of law, is plainly untenable as there is clearly statutory power under s 69(1) of the Education Act 1996 for the Director of Examination Board to grant approval for the UEC examination to be conducted at a non-CPSS school, such as the school.

[46] The next relevant question here is whether such written approval was obtained so that the students of the school may lawfully take the UEC examination. As I said, as a matter of fact, since October 2016, the students of the school have been taking the UEC examination. The Ministry of Education is not just aware of this but have also given the go-ahead for the students to take the UEC examination. According to the school there has been no adverse reaction or any action or reprimand or censure by the Ministry of Education against Dong Zong or the school, arising out of the students of the school taking the UEC examination. Indeed, given the deep interest and fixation shown by P1 to P4 in this matter, I am certain that if there was any such enforcement or reprimand or criminal charges by the Ministry of Education against the school or Dong Zong, they would have promptly drawn the court's attention to the same. But to date there is none. The question is why hasn't the Director of Examination Board or Ministry of Education taken any action against the school or Dong Zong in respect of the former's students taking the UEC examination which was conducted by Dong Zong. To me, the answer lies in the clear, unambiguous and express approval that was given by the Ministry of Education to the school which permitted their students to be taught the national curriculum (KBSM/KBSR) and the non KBSM/KBSR curriculum, ie curriculum for the UEC examination as well.

[47] It is important to recall and reiterate that the Ministry of Education's approval to the school was explicitly for:

> KURIKULUM KEBANGSAAN (KBSM/KSSM)
>
> (Kurikulum yang diluluskan bagi institusi ini adalah Kurikulum Kebangsaan (KBSM/KSSM). Kementerian Pendidikan Malaysia juga mengambil maklum bahawa institusi yang ditubuhkan ini *akan melaksanakan mata pelajaran di luar Kurikulum Kebangsaan).* (Emphasis added.)

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(see: p 139 exh T9, encl 31)

[48] Thus, it is clear from the several exchange of letters between the various parties, that the Ministry of Education was not objecting to the students of the school taking the UEC examination and had in fact allowed the school to teach the non KBSM/KBSR curriculum which includes the UEC examination. As such, the Ministry of Education is precluded from objecting to or from taking any action against the school or against Dong Zong, because written permission had already been given for the students of the school to be taught the non-national curriculum pertaining to the UEC examination, which means that they are allowed to take the UEC examination which is to be conducted by Dong Zong.

[49] Thus, the approval that was given by the Ministry of Education via letter of approval dated 26 July 2012 and the Certificate of Registration dated 21 April 2014 together with the letters that were sent by the school and replies given by the Ministry of Education which took note of the fact that the school will be teaching the non-national curriculum ie UEC curriculum was effectively a *fait-accompli* situation and there is no room for any argument that any further written approval is necessary under s 69(1) of the Education Act 1996.

[50] In the result, I am in agreement with the submissions put forward by counsel for Dong Zong that approval under s 69(1) of the Education Act 1996 is not necessary, as such approval is already subsumed in the approval which was given in 2012 for the setting up of the school and when the Certificate of Registration was issued on 21 April 2014. As such, I am of the view that the conduct of the UEC examination by Dong Zong and the taking of the UEC examination by students of the school in October 2016 and October 2017 is lawful and is completely in compliance with the terms/conditions of the approval that was given by Ministry of Education (in 2012) and when the school was registered in 2014.

THE OUTCOME

[51] Thus, in view of my conclusions and findings as stated above, the declaratory orders which I shall now make are as follows:

(a) it is hereby declared that although Sekolah Menengah Chong Hwa Kuantan ('the school') is not one of the 60 Chinese Private Secondary Schools ('CPSS'), the school and/or the United Chinese School Committees' Association of Malaysia ('Dong Zong') is/are not required to obtain any prior written approval from the Director of Examination

under s 69(1) of the Education Act 1996 for Dong Zong to conduct the Unified Examination Certificate ('UEC') for the students of the school;

(b) it is hereby declared that it is legal for Dong Zong to allow the students from the school to participate in the UEC examination;

(c) it is hereby declared that the students from the school are legally entitled to participate in the UEC examination; and

(d) I make no order as to costs.

Order accordingly.

Reported by Dzulqarnain Ab Fatar